In the

United States

Court of Appeals

For the Ninth Circuit

KATHERINE HEIN, *Appellant,*

v.

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Appellee.*

No. 13027

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES—*Continued*

CONSTITUTION

STATUTES AND COURT RULES

TEXTS

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JURISDICTION

The jurisdiction of the District Court to entertain the application for writ of habeas corpus is doubted. The jurisdiction to hear the appeal is found in 28 U.S.C.A. § 1291, pursuant to the issuance of a certificate of probable cause under 28 U.S.C.A. § 2253.

STATEMENT OF FACTS

A. The Trial

Appellant's statement of the case cannot be accepted as being fully supported by the record. It represents as

true, the testimony of witnesses who were disbelieved by the jury.

Late Tuesday afternoon, November 18, 1947, the body of an aged, blind, and crippled pensioner, James Moore, was found lying in a pool of blood in his blood-spattered home at Hartford, Washington. His head had been almost severed by the vicious strokes of a "sharp" "cutting instrument" (R. 691, 664). The splintered and bloody portions of his white cane, the bloody piece of stove wood found nearby, the condition of his face and head, and the shambles of the room, bore mute testimony to violence. Death had not come easy and thus the murderer, Richard Hein, wrote:

> "He still grouned [sic] with pain so I took up a knife, and cut his throat and took the money he had with him which amounted up to $15.80 and got out of there." (R. 845, Appellant's Br. 6).

Neither the victim's money nor billfold was found. The light globe had been shattered and its glass was found under and around the body. (R. 604, 663, 699).

Investigation presented the following proof:

On the morning of Saturday, November 15th, James Moore purchased a loaf of bread in a nearby grocery store. He received $4.79 in change. His billfold, otherwise, contained only a ten-dollar bill. Richard Hein, who was in the store, left fifteen minutes later. (R. 837-841). The next day, Sunday, although Hein received but a small allowance (R. 975), he had at least $11.00, including a ten-dollar bill. He purchased for himself and several boys, some of whom he knew but slightly, candy and ten gallons of gas. (R. 782, 785, 787, 945).

At school, on either Monday or Tuesday (R. 777), *prior* to the discovery of the murder, he told Inez Pitzer

and Ruth DeMonbrun that he had murdered James Moore to get a red hat. (R. 779, 953-954), and to "look in the paper for it." (R. 790). (R. 777-790). The evening newspaper contained nothing about the murder. (R. 777, see also 1086, 1087).

On Monday, Hein also informed one Joe Jensen, a school friend, that

> "He went in to visit this man, James Moore, and he picked up the cane and hit the lamp, and broke the lamp; and then hit him on the back of the head with the cane, and the cane was broke. And then he went in and got some wood out of the kitchen there, and hit him across the eyes, and then he went over backwards.
>
> "He knew he would probably squeal, or something, and he went in and got the knife, and cut his throat three times; took his money out of his billfold, $15.00, and threw the knife in the junk yard." (R. 793, see also R. 504, 1148 *et seq*).

Joe told his grandmother, who advised silence so not to become involved. The following Thursday, Hein told Joe that two suspects were in jail already (R. 794).

Sheriff's deputies, upon hearing rumors, questioned Joe at school, both alone and in the presence of the principal (Mr. Niccolino, R. 1345). Joe told them of Hein's admissions (R. 794, 1139-1141). Hein was arrested at the local pool room and taken to the Sheriff's office where the statements were repeated to his face. All was transcribed (R. 504-509). Joe thought Hein was kidding until he saw the story in the paper (R. 505). Note that Joe Jensen, on November 24th, stated Hein had told him that he had thrown the knife "in the junk yard" (R. 504; R. 507):

Weaver:

> "Q. How many times did he say he used the knife on him?

"A. About two or three times.

Sheridan:

"Q. What did he say he did with this knife?

"A. Threw it in the junk yard.

"Q. What junk yard?

"A. I don't know.

"Q. What junk yard, Richard?

"A. I didn't have the knife so I wouldn't know."

This was PRIOR to the discovery of the knife!!

Routine search of Hein disclosed, in a corner of his wallet, a note dated "November 17, 1947," (Monday) in which the murder of James Moore was described in accurate detail (R. 633-636, 726, 805, 508). Hein has alternately admitted and denied and said "maybe" as to the authorship of the note and such were his statements on the witness stand (R. 508, 962, 963, 973, 974-76). Hein's parents were notified and Hein jailed.

That night the night jailer saw a new face—Richard Hein's—in jail. He asked him what he was doing there (R. 772). Hein answered he was in for murder. The jailer asked:

"Who it was that he was supposed to have murdered?"

Hein answered: "The old man at Hartford."

"Q. Did you talk to him any further?

"A. I asked him if he murdered this man.

"Q. What was his response to that?"

Hein answered: "Uh-huh, but they'll have to prove it on me" (R. 773, 774).

Subsequently, on November 29th, the Moore kitchen knife, covered with blood, was found in a brush-covered junk yard not far from the Hein and the Moore homes

(R. 629-631, 647-653, 706-707, 739-740). Due to the passage of time and weather, whether the blood was human or animal could not be determined. Florence Moore, the wife of the victim, identified the knife (R. 761):

> "Yes, sir. I have used that knife many a time, and that's been scoured many a day."

The defense was alibi—his father and mother knew accurately of his whereabouts from Saturday to Tuesday. The jury was strongly urged, as is this court, that Hein was but an imaginative schoolboy who had learned of the crime in the newspaper, then said he was the murderer. The defense neither did nor could explain how he knew where the murder weapon was to be found; how he knew in detail of the murder prior to its discovery, or why he admitted the murder subsequent to his arrest. Hein's testimony was evasive and inconsistent. His reputation witnesses added nothing. His conviction was appealed but affirmed.

B. Habeas Corpus Proceedings in State Courts

Thereafter, application was made to the Washington Supreme Court for a writ of *habeas corpus*. The show cause order was made returnable in Snohomish County Superior Court (No. 48277). The hearing lasted two days, and the application was denied.

Inez Pitzer testified that, as she remembered (twenty months later), Hein may have admitted the murder the latter part of the week rather than on Monday or Tuesday. However, she admitted that her statement, setting Hein's admissions prior to the discovery of the murder, was written without coercion and must have been true (R. 1088):

> "because I wouldn't write anything that wasn't true."

Joe Jensen testified that he had been forced to lie at the previous trial (R. 1113-1189, 1325-1331), but he did not tell anyone he had lied because he didn't think it important. Inconsistently he admitted his longhand statement to be true (R. 1168), but later denied the matters set forth therein (R. 1169-1170). The trial judge thus described his testimony (R. 1409):

> "The testimony of Joe Jenkins [*sic*] here upon the stand in this proceeding was so unsatisfactory, it was so inconsistent; there were so many discrepancies in it, that this court after hearing it all is firmly of the opinion that Joe Jenkins [*sic*] told the truth upon the witness stand, and that he did not tell the truth here before this court; that he told the truth at the time of the trial originally, but that he did not tell it here in court."

Jensen denied discussing the murder with his family upon seeing the FIRST newspaper account of the murder. This was repudiated by his own sister who testified upon arrival of this newspaper that Joe Jensen had declared he had been told all about the murder by the boy who committed it (R. 1397).

C. Habeas Corpus Proceeding in the District Court

This was but another trial on previous contentions (See Finding XVI, R. 534). Counsel for appellant insisted upon and was permitted to present evidence going to guilt or innocence, a question already settled by the jury. Certain "new evidence" was supposedly presented.

Meat Cleaver: It was for the first time contended that the murder weapon had been a meat cleaver which had been known of but not produced at trial. Testimony was by a paid private detective whose business normally consisted of obtaining evidence in divorce cases (R. 92). His conclusion was based upon "one look" (R. 94) at the

corpse. The wounds could have been caused by a knife however (R. 92).

He first heard of the alleged cleaver when a mysterious stranger approached him and told him to buy a certain detective magazine (R. 87). For a reason unfathomable to the writer (who was not present at the hearing), the detective magazine was permitted as evidence, thus compounding fancy upon fancy.

Lie Detector Tests: The operator of this so-called test, " a salesman by the name of Gant" (R. 65), was not present at the trial, but a letter from him was presented by others. A motion to strike such evidence was granted (R. 66), because the test had not been administered by an expert.

Truth Serum Test: A young doctor with but six months' private practice (R. 58) who normally handled anesthesia in surgery gave this supposed test. This was his third attempt and the first in the last year. The first two therefore were while he was either a student or interne. He had taken no course of study on the subject (R. 59)—none existed, thus indicating the value placed upon such tests by the medical profession.

The doctor misrepresented that Hein was maintained at a level of drug influence where he could not count backward from one to ten (R. 51). However, the transcript of this "interview" (R. 102-121) discloses that Hein was NEVER so requested to count. Further, that on ALL occasions when asked to count he was able to do so in proper numerical sequence.

The statements of Hein, while drugged, are evasive, conflicting and perjurous, as was his testimony at the trial. Note:

1. R. 102—Hein denied *ever* being in the Moore home.

2. R. 104—He denied buying candy for the boys for whom he bought gas on Sunday.

3. R. 106—He answered "Yes and No" when asked if he ever told Joe Jensen he had killed a man.

4. R. 108—He answered "Yes and No, I don't remember" when asked whether he told Jensen that he "had thrown a knife into a trash pile."

5. R. 109, 113—He denied telling a girl that he had killed a man for his red hat, although he admitted this at the trial (R. 851, 953-954).

6. R. 114—He admitted grand larceny of federal funds from a postmistress, but denied, to the surprise of his interviewers, that he on another occasion broke into a grocery store (R. 116).

The "test" merely showed that Richard Hein could lie as well while drugged as while sober.

D. Prior Judicial Determinations

Richard Hein's trial has been judicially determined to have been fair on the following previous occasions (Findings R. 529-538):

(1) The trial: (Snohomish County No. 801) in which the confession was contested by (a) motion to suppress prior to trial, (b) objection and argument during trial, and (c) motion for new trial.

(2) Conviction affirmed on appeal: *State v. Hein,* 32 Wn. (2d) 315, 201, P. (2d) 691 (1949). Petition for rehearing denied, 32 Wn. (2d) 323.

(3) The application for writ of *habeas corpus* to the Washington Supreme Court (No. 31139), and the show cause order, returnable before the Snohomish County Superior Court, No. 48277, resulting in a full two-day hearing and denial of the petition.

(4) Affirmed on appeal. *In re Hein v. Smith,* 35 Wn. (2d) 688, 215 P. (2d) 403 (1950). Matters there alleged are identical to matters alleged in the district court (Finding VI, R. 531).

(5) While the latter appeal was pending, the prisoner moved for a new trial in the Superior Court. This was contested and denied.

(6) An original writ of mandate was then sought against the lower court in Washington Supreme Court No. 31375. This was denied.

(7) Petitioner then sought certiorari. The petition, copy of which is an exhibit herein, contained approximately 264 typewritten pages, all basically alleging the identical issues presented here. The petition was denied. *Hein v. Smith,* 340 U. S. 837 (1950).

(8) The hearing on the application for writ of *habeas corpus* and show cause order in Federal District Court, and

(9) This appeal.

E. State of Record

The original state court records are on file herein. The confused record on appeal results from the appellant (apparently feeling this court was appellate to the State trial court), designating as relying on appeal that due process was violated because of an entire absence of evidence to convict (R. 551), and then excerpting only portions of the testimony. In view of this designation and the quoting from context, appellee designated all those portions of the record omitted by appellant. Appellee furnished, at its own expense, copies of the complete transcripts of the original trial and of the *habeas corpus* hearing in Snohomish County. The lower

court ordered this to be Volumes 4 and 5 of the record on this appeal.

Judge Driver, however, while admitting appellee's right to the full record and permitting such copies to be furnished, also included appellant's excerpted portions, thus leading to the duplication. R. 125-331 and R. 351-503 consists of testimony duplicated in Volumes 4 and 5, the complete transcripts.

APPELLANT'S ASSIGNMENTS OF ERROR

We call to the attention of the court that appellant's assignments of error (App. Br. 15-16) materially vary from his "Points to be Relied Upon On Appeal" (R. 551). See Federal Rule of Civil Procedure, 75 (d). Further, his argument doesn't appear to follow either (see Appellant's Index, Br. iii, iv).

SUMMARY OF ARGUMENT

I.

THE APPLICATION SHOULD NOT HAVE BEEN ENTERTAINED

The district court has no jurisdiction except where granted by Congress, which body has stated the "APPLICATION" for writs of *habeas corpus* from prisoners confined in state institutions "SHALL NOT BE GRANTED" if state remedies are still open "*by any available procedure,*" 28 U.S.C.A. § 2254. The effect is to eliminate the right to apply to lower Federal courts for *habeas corpus* in all states in which successive applications may be made for *habeas corpus* to the state courts. 8 *Fed. Rule Dec.* 176. A contrary rule is a condemnation of the integrity of all state judges.

II.

CONFESSION

The confession was recovered subsequent to and as an incident of lawful search and seizure. There can be no question as to its probity—its weight was for the jury. The defense admitted its authorship, but strongly urged upon the jury that it was but a product of boyhood imagination. Failing that, appellant now attempts to so convince this court. The trial judge did not give a special instruction regarding it for fear of lending it too much emphasis. However, instruction No. 10 (R. 1015), regarding "such admissions or confessions" properly advised the jury of the applicable law. Failure to give a non-requested instruction can hardly be a basis for *habeas corpus.*

III.

ALLEGED PERJURY

The evidence completely sustains the finding of the lower court that no perjury was committed at the trial. Joe Jensen's testimony at the state *habeas corpus* hearing wherein he "admitted" previous perjury was too evasive and inconsistent for belief. His subsequent affidavit admits he told the truth at the trial and not the state *habeas corpus* hearing.

IV.

ADMISSION SUBEQUENT TO ARREST

It goes without citation that an UNCOERCED admission made by an accused to a police officer is admissible in evidence. Appellant's contentions would eliminate all confessions. This contention is first made on this appeal.

V.

TESTIMONY OF PHYLLIS MOOTZ

The opinion of Phyllis Mootz that Hein's denial of guilt was not emphatic, was invited and explored by defense on cross-examination. This contention also is first made in this court.

VI.

TRUTH SERUM

Statements made while under the influence of drugs are unreliable and admittedly inadmissible in a criminal trial. Since they go only to guilt or innocence, they are inadmissible in a *habeas corpus* proceeding.

VII.

EFFECT OF CERTIORARI

Contrary to appellant, the district court lent too *little* emphasis to the effect of the denial of *certiorari* on identical contentions.

ARGUMENT

I.

THE DISTRICT COURT SHOULD NOT HAVE ENTERTAINED THE APPLICATION

Congress, under *Art.* I, § 8, *cl.* 9, of the United States Constitution, has the power to create federal courts inferior to the Supreme Court and to define and limit their jurisdiction. See *Kline v. Burke Construction Co.*, 260 U. S. 226, 234 (1922):

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion provided it be not extended beyond the boundaries fixed by the Constitution. *Turner v. Bank of North America,* 4 Dall. 8, 10; *United States v. Hudson and Goodwin,* 7 Cranch, 32; *Sheldon v. Sill,* 8 How. 441, 448; *Stevenson v. Fain,* 195 U.S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *Nashville v. Cooper,* 6 Wall. 247, 252. And the jurisdiction, having been conferred, may, at the will of Congress, be taken away in whole or in part; and, if withdrawn without a saving clause, all pending cases, though cognizable when commenced, must fall. *Assessors v. Osborne,* 9 Wall. 567, 575."

See also, *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 330 (1938); *Railroad Co. v. Grant,* 98 U. S. 398, 401, 402

(1878), and many cases cited; *Lockerty v. Phillips,* 319 U. S. 182, 187 (1942); *Ex Parte McCardle,* 7 Wall. 506, 514 (1868) *habeas corpus*; *Norris v. Crocker,* 13 How. 429, 439, 440 (1850); *Insurance Co. v. Ritchie,* 5 Wall. 541, 544 (1866); *Smallwood v. Gallardo,* 275 U. S. 56 (1927).

For a recent case in this Circuit, see *Potter v. Kaiser Company,* 171 F. (2d) 705 (9-Cir. 1949), which held valid the right of Congress to divest Federal courts of jurisdiction to hear portal to portal cases.

A. Exhaustion of State Remedies

Federal district courts have no inherent power to review state action by *habeas corpus.* Their jurisdiction is solely that which is granted them by Congress. 28 U.S.C.A. § 2254, provides:

> "State Custody; Remedies in State Courts. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court *shall not be granted* unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, *by any available procedure*, the question presented." (Emphasis supplied.)

There are two exceptions: (1) If state remedies have been already exhausted or no longer exist, and (2) the existence "of circumstances rendering such process ineffective to protect the rights of the prisoner."

John J. Parker, Chief Judge of the Court of Appeals for the Fourth Circuit was the Chairman of the Judicial

Conference of Senior Circuit Judges Committee appointed in 1942 to investigate, analyze, and make recommendations as to the correction of the abuses then (and now) rampant in *habeas corpus* matters. These recommendations were enacted into law by Congress after the Committee of the Judiciary, the Committee on the Revision of the Judicial Code, and the Congress had passed upon them.

Judge Parker thoroughly analyzes Federal *habeas corpus* procedure in his article "Limiting the Abuse of Habeas Corpus," 8 *Fed. Rules Dec.* 171-178 (1948). He states:

> "The effect of this last provision is to eliminate, for all practical purposes, the right to apply to the lower federal courts in all states in which successive applications may be made for habeas corpus to the state courts; for in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to have action upon such later application reviewed by the Supreme Court of the United States on application for certiorari." 8 *Fed. Rules Dec. 786.*
>
> "The thing in mind in drafting this section was to provide the review of state court action to be had so far as possible only by the supreme court of the United States, whose review of such action has historical basis, and that review NOT BE HAD by the lower federal courts whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction." (Emphasis supplied.)

Judge Parker's article is quoted with approval in *Darr v. Burford,* 339 U. S. 200, 212 (1949) at footnote 34; *Adkins v. Smyth,* 188 F. (2d) 452 (4-Cir. 1951); *Stonebreaker v. Smyth,* 163 F. (2d) 498, 501 (4-Cir. 1947):

> "The former proceeding [habeas corpus] in the state court will not preclude the filing of a petition now, since the principle of res adjudicata is no more

> applicable to habeas corpus proceedings in the courts of Virginia than in the federal courts; and until action in the state courts has been invoked on the basis of the decision relied on, it cannot be said that state remedies have been exhausted in the present status of the case so as to justify resort to the federal jurisdiction."

There is no question but that the Washington Supreme Court does grant hearings on successive applications for *habeas corpus*. This was admitted by the district court below. (R. 525, 526.) See *In re Voight*, 130 Wash. 140, 226 P. (2d) 482 (1924); *Voigt v. Mahoney*, 10 Wn. (2d) 157, 116 P. (2d) 300 (1941); see also *Jones v. Cranor*, Wash. Sup. Ct. Nos. 31122, 31237 and 35 Wn. (2d) 938, 212 P. (2d) 776 (1949); *George Latimer v. Cranor*, Wash. Sup. Ct. Nos. 27973, 28216, 29244, 29472, 29533, 31157 and 31667, and 184 F. (2d) 185 (9-Cir. 1950).

The scope of Washington state *habeas corpus* inquiry is as broad as the Federal writ. *In re Whipple v. Smith*, 33 Wn. (2d) 615, 617, 206 P. (2d) 510 (1949). *Rem. Rev. Stat.*, § 1075 (1947 Supp.) permits an application on writ of *habeas corpus*,

> "where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the State of Washington or of the United States have been violated."

Res adjudicata as to *habeas corpus* is no more applicable in state than in Federal courts.

Darr v. Burford, 339 U. S. 200, 216 (1949) thoroughly analyzed many of the previous cases. The opinion therein states:

> "This court has evolved a procedure which assures an examination into the substance of a prisoner's protest against unconstitutional detention without allowing destructive abuse of the precious

guarantee of the Great Writ. Congress has specifically approved it * * *

"It is this court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal *only* by this court and that a state's system for the administration of justice should be condemned as constitutionally inadequate *only by this court.* From this conviction springs the requirement of prior application to this court to avoid unseemly interference by federal district courts with state criminal administration. * * *

"Oklahoma denied *habeas corpus* after obviously careful consideration. *If that denial violated federal constitutional rights, the remedy was here, not in the district court* and the district court properly refused to examine the merits." (Emphasis supplied)

See also *Salinger v. Loisel,* 265 U.S. 224 (1923).

The purpose of the doctrine is obvious. Otherwise, a single federal district court judge would constitute a court of appeal to not only the Superior, but the Supreme Court of the State of Washington.

It would hold that the judges of this state are either incapable or unwilling to uphold their judicial oaths and duties, in the determination of constitutional questions applicable to the "American," not solely "Federal," theory of fair trials. See 8 *Federal Rules Dec., supra,* at 176. *Adkins v. Smyth, supra,* 188 F. (2d) 452 and *Stonebreaker v. Smyth, supra,* 163 F. (2d) 499, both stating:

"It would be intolerable that a federal district court should release a prisoner on *habeas corpus* after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on *certiorari.* This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state."

Where state remedies have not been exhausted, the application *"shall not be granted."* Jurisdictionally stronger language could hardly be found. That 28 U.S. C.A. § 2254 is a matter of "jurisdiction," see *Stonebreaker v. Smythe,* 163 F. (2d) 498 supra. *Hawk v. Jones,* 160 F. (2d) 807 (8-Cir. 1947) *cert. denied* 332 U.S. 779; *U.S. ex rel. Carter v. Ragan,* 153 F. (2d) 902 (7-Cir. 1946); and see *United States ex rel. Foley v. Reagan,* 143 F. (2d) 774 (7-Cir. 1944).

The existence of state remedies applies to the availability of "hearings" not the sure release of the petitioner. The Freedom Writ, 61 Harv. L. Rev. 657, 668:

> "Whenever all evidence of alleged unfairness was fully litigated before a competent tribunal, subsequent collateral attack by *habeas corpus* is not normally permissible. Such complete litigation of the alleged unfairness is itself the fairness to which the defendant was entitled."

B. Exceptional Circumstances Doctrine

Under 28 U.S.C.A. § 2254, federal courts may entertain applications for *habeas corpus* from prisoners in state institutions on occasion of

> "the existence of circumstances rendering such [state] process ineffective to protect the rights of the prisoner."

This appears to be the previous "Exceptional circumstances of peculiar urgency doctrine." *Ashe v. U. S. ex rel. Valotta,* 270 U.S. 424 (1926); *Baker v. Guce,* 169 U.S. 284 (1898); *Buchanan v. O'Brien,* 181 F. (2d) 601 (4-Cir. 1950); *U.S. ex rel. Murphy v. Murphy,* 108 F. (2d) 861 (2-Cir. 1940) *cert. denied* 309 U.S. 661; *U.S. ex rel. Ray v. Martin,* 141 F. (2d) 300 (2-Cir. 1944); *Slaughter v. Wright,* 135 F. (2d) 613 (5-Cir. 1943); *Johnson v. Wilson,* 131 F. (2d) 1, (5-Cir. 1942); *McClaude v. Majors,* 102 F. (2d) 128

(5-Cir. 1939); *Potter v. Dowd,* 146 F. (2d) 244 (7-Cir. 1944) and see dissent; *Kelly v. Dowd,* 140 F. (2d) 81 (7-Cir. 1944), *cert. denied* 320 U.S. 786 and 321 U.S. 783; *Hart v. Olson,* 130 F. (2d) 910 (8-Cir. 1942) *cert. denied* 317 U.S. 697; *Gebhart v. Amrine,* 117 F. (2d) 995 (10-Cir. 1941).

For previous cases in this court see *Hogue v. Duffie,* 124 F. (2d) 864 (9-Cir. 1942) *cert. denied* 316 U.S. 675; *Palmer v. McCauley,* 103 F. (2d) 300, (9-Cir. 1939); *Paul v. People of State of California,* 79 F. (2d) 132 (9-Cir. 1935) foll. in 91 F. (2d) 1016, *cert. denied* 303 U.S. 636, and *Bird v. Smith,* 175 F. (2d) 260 (9-Cir. 1949) see *Ex parte Hawke,* 321 U.S. 114 (1944); *Darr v. Burford, supra:*

> "The exceptions are few, but they exist."

See also 65 *A.L.R.* 733; 25 *Am. Jur.* 155, *Habeas Corpus,* § 18; *United States ex rel. Kennedy v. Tyler,* 269 U.S. 15, 17-19 (1925):

> "The due and orderly procedure of justice in a state court is not to be interfered with [by *habeas corpus* in a Federal district court] save in rare cases, where exceptional circumstances of peculiar urgency are shown to exist." Citing many cases.

Such exceptional circumstances require (1) necessity for a prompt disposition, and (2) cases, for instance:

> " 'Involving the authority and operations of the general government or the obligations of this country to, or its relations with, foreign nations.' " *Urquhart v. Brown,* 205 U.S. 179, 182 (1907).

While a more particular definition of "exceptional circumstances" and "peculiar urgency" is not found, all cases agree that the mere fact of imprisonment where federal constitutional rights are involved is not sufficient.

The petition contains no allegations and the record no facts, even inferring that this case is either exceptional or urgent. Further, this court has held that Washington remedies have not yet been exhausted when the writ of *coram nobis* has not been sought. *United States ex rel. White v. Walsh,* 174 F. (2d) 49 (9-Cir. 1949); *Hanson v. Smith,* 162 F. (2d) 334 (9-Cir. 1947); and *Thompson v. Smith,* 161 F. (2d) 728 (9-Cir. 1947).

Thus, (1) Washington remedies have not yet been exhausted, and (2) exceptional circumstances of peculiar urgency are neither present nor alleged. Where such is true, Congress has stated that an "application" for writ of *habeas corpus* "Shall Not Be Granted." The prohibitory language could not be stronger. It was, therefore, jurisdictionally erroneous to grant the application and the ultimate denial of the petition was proper.

II

THE CONFESSION

A. As Incident to Lawful Arrest

The original trial court found as a matter of fact that the confession was found subsequent, and incident to lawful arrest (R. 835). Apparently, on appeal, no serious contention was made that this was not so. *State v. Hein,* 32 Wn. (2d) 315, 317, 201 P. (2d) 691 (1949).

The trial judge who took testimony in the state *habeas corpus* hearing also so found (R. 1406). This too, was affirmed on appeal. *In re Hein v. Smith,* 35 Wn. (2d) 688, 689, 215 P. (2d) 403 (1950). Judge Driver made a specific finding to this effect (R. 533):

> "The confession has been uniformly held to have been taken from Richard Hein, the defendant, subsequent to and as an incident of lawful arrest. After

full consideration of the evidence as it appears from the records, I also so find."

Appellant apparently concedes at page 26 of his brief, "B", that the arrest was lawful, and the confession would be proper as long as not coerced or improperly induced. No inducement to the writing is, or could be alleged (Judge Driver's letter to counsel R. 513-514). The evidence herein, clearly preponderates in favor of the court's finding and should again be affirmed.

4 Wigmore on Evidence 20, Admissions, § 1058:

> "It is immaterial that the admission, when made in writing, is found in a paper *retained by the maker*, and not comunicated to anyone else. This is because the statement none the less represents a deliberate utterance of the party, even though he retains it in his own custody and undisclosed."

B. Use of the Confession in Evidence

Appellant contends that under Washington law, that the confession was inadmissible. This is about as conclusively as possible refuted by *In re Hein v. Smith*, 35 Wn. (2d) 688, 215 P. (2d) 403 (1950) where these matters were strenuously urged but denied. But see also *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (1893) and *State v. Royce*, 38 Wash. 111, 80 Pac. 268 (1905).

The following quotations from Wigmore are apposite, 4 Wigmore on Evidence, *supra*, 7, Admissions, § 1050:

> "A Confession is one species of Admission, namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge (*Ante*, § 821). The peculiarity of Confessions in evidence is that they are subjected to the additional limitation when offered in criminal cases,—the limitation that they must have been made without any inducement calculated to destroy their trustworthiness" * * * *.

> "Since a Confession is merely one sort of an Admission, *all admissions are usable against the accused in a criminal case.*"

Appellant admits in his brief at page 24 that the document is a confession. As Judge Driver concluded (R. 536):

> "The document in the handwriting of Richard Hein which set forth the manner in which he purportedly committed the murder was written by him entirely voluntary and of his own accord. It could in no sense be a coerced or improperly induced confession. It was taken subsequent and incident to lawful arrest by state officers in a state court."

The federal fourteenth amendment, therefore does not forbid its use as the fruit of an unreasonable search and seizure. *Wolfe v. Colorado*, 338 U. S. 25 (1949); *Elwood v. Smith*, 164 F. (2d) 449 (9-Cir. 1947).

III

ALLEGED PERJURY

This contention does not seem to be as strongly urged as previously. Joe Jensen testified at the State *habeas corpus* hearing that he had lied at the trial upon threat of certain police officers. His testimony was inconsistent, wavering, and contradicted by not only police officers, but his own sister.

Judge Driver found (R. 534-535):

> "The trial judge who was in a position to hear the witnesses and consider their appearance, conduct and demeanor on the witness stand, found not only that the enforcement and prosecutive officers neither induced nor knowingly used perjured testimony of the witness Jensen, but that Jensen did not give perjured testimony at the trial. (See the trial judge's oral decision in finding VIII [R. 532] above). I also so find.

"XII

"Thorough examination of the cold records leads me to the same conclusion as that expressed by the state court trial judge in the foregoing quotation (Finding VIII)."

Further, Joe Jensen later admitted, by affidavit found in the mandamus proceeding on file herein that he told the truth at the trial. Judge Driver's letter to counsel (R. 515). The record supports these findings.

IV

ADMISSION SUBSEQUENT TO ARREST

Hein, after his arrest, was conversing with the night jailor and admitted the crime. Appellant contends that although there was no coercion or duress, (and the admission was not and is not denied), that this admission was not admissible because at some other time, in some other jail, and with some other defendant, there *may* be coercion.

But to state the proposition is to refute it, but see 4 *Wigmore on Evidence*, 7 *supra*, that all admissions, not obtained by duress, are admissible in a criminal trial. *Bram v. United States*, 168 U. S. 532 (1897) merely holds that a confession or admission obtained by duress and improper inducement is inadmissible in a Federal trial. With this we have no quarrel. However, here, there is neither showing nor contention that Hein's admission of guilt was anything but voluntary.

However, a more simple answer to this contention is that it is made for the first time on appeal. Neither the petition (R. 1-14) nor the district court proceedings disclose it. It is elementary, that except as to lack of jurisdiction, that matters not alleged at trial cannot be heard on appeal. *Boyce v. Chemical Plasters*, 175 F. (2d) 839, 843 (8-Cir. 1949).

V

TESTIMONY OF PHYLLIS MOOTZ

Appellant's imaginative efforts to show a violation of due process lead him to the rather astounding contention that the prosecutor controlled cross-examination by defense counsel.

Miss Mootz, the secretary to the prosecutor, took shorthand notes of the questioning of Hein in the presence of Joe Jensen. She testified as to matters which there occurred and to Hein's threatening Jensen for his disclosures. On cross-examination (R. 810-813), the defense was by exploration, attempting to get her to state (and to convey the impression to the jury) that Hein constantly and vigorously denied his guilt. After several such questions, in answer to:

> "He denied throughout their conversation and throughout all of the questioning they gave him there, that he killed Mr. Moore?"

She stated:

> "Yes, but he wasn't emphatic about it."

The defense then, without moving to strike, explored this at some length in an effort to show prejudice.

This contention also was not made in the district court and is thus improperly made here. The same is true concerning appellant's contentions regarding the attempt made at trial, without objection (R. 873-875) to impeach the step-father of Hein.

VI

TRUTH SERUM

As attractive a solution to the problem of crime the so-called "truth-serum" test may seem to be, it was error to admit such in evidence. Appellant admitted that it and the lie-detector test were "probably inadmissible" in a criminal trial (R. 535).

Not only did an inexperienced and untrained young doctor perform it; but, he misrepresented to the court the level of consciousness maintained; the questions were clearly leading; were prepared by persons interested in the defense and/or paid to be so; no other doctor was present, and of course, there was no opportunity for cross-examination.

Lie detector tests are uniformly held inadmissible as not sufficiently reliable. Cases cited in 20 Am. Jur. 633, *Evidence*, § 762; 34 A.L.R. 147 (1924), 86 A. L. R. 616 (1933), 119 A. L. R. 1200 (1939), and 139 A. L. R. 1172 (1942).

Only one case has been located in which "truth-serum" has been offered in evidence. *State v. Hudson*, 289 S. W. 920 (Mo. 1926). The rejection of such evidence by the trial court was affirmed and the court stated:

> "It was sought to introduce in evidence the deposition of a doctor residing elsewhere, who testified to the effect that he had administered to the defendant what he termed a 'truth-telling serum,' and that while under its influence the defendant had denied his guilt. Testimony of this character—barring the sufficient fact that it cannot be otherwise classified than as a self-serving declaration—is, in the present state of human knowledge, unworthy of serious consideration. We are not told from what well this serum is drawn or in what alembic its alleged truth-compelling powers are distilled. Its origin is as nebulous

as its effect is uncertain. A belief in its potency, if it has any existence, is confined to the modern Cagliostro, who still, as Balsamo did of old, cozen the credulous for a quid pro quo, by inducing them to believe in the magic powers of philters, potions and cures by faith. The trial court therefore, whether it assigned a reason for its action or not, ruled correctly in excluding this clap-trap from the consideration of the jury. Cogent reasons based upon numerous rulings, cited in the respondent's brief, bear ample testimony to support the wisdom of the court's ruling."

See Despres, Legal Aspects of Drug Induced Statements, 14 *Univ. of Chi. L. Rev.* 601 (1947) wherein the author quotes from Doctors Sargant and Slater, *An Introduction to Somatic Methods of Treatment in Psychiatry* (1944), in describing the effect of sodium pentothol and related drugs:

"It is commonplace that under the influence of alcohol a man reveals tendencies that remain hidden in everyday life and may become suggestible, obstinate, euphoric, or boastful. Tongues are loosened by drink; critical judgment is suspended and secret aspirations, damaging confessions, and dramatic falsifications of previous events come pouring out. Psychiatry has taken a trick and turned it into a technique. But what it now sometimes graced with the high-sounding title of 'narcoanalysis' is no more than the method employed from time immemorial by the colonel in the mess to discover the qualities of the newest subaltern. Instead of alcohol, whose effects take some time to produce, are unreliable and difficult to control, we now employ a barbiturate to which these objections do not apply. But the effects are much the same. Both in the normal, the neurotic, and the psychotic, the drug abolishes inhibitions and allows underlying thought processes and preoccupations to appear. In addition, if there is much associated anxiety, this is partly at least abolished. The great value of the intravenous barbiturate for diagnostic purposes in the psychotic is sometimes not sufficiently realized. Under the influence of a suit-

able dose, the retarded depressive may become free, able to talk, and even cheerful. * * * There is reduction of the critical sense, an enhancement of rapport, and often a pouring out of both truth and fantasy equally. Aggressive feelings, which would terrify the individual in his normal state, can be expressed without excessive anxiety and the emotional experiences of the past can be lived anew without disturbances of the autonomic equilibrium."

See also Lorenz, *Criminal Confessions Under Narcosis,* 31 Wis. Med. J. 245 (1932).

Further, the only possible purpose of such tests went to the guilt or innocence of Hein. The jury verdict, under proper instructions, after a fair trial, had foreclosed this question.

VII.

EFFECT OF DENIAL OF CERTIORARI

Appellants extended argument that the denial of *certiorari* in *habeas corpus* cases is entirely without significance, appears answered by *Darr v. Burford, supra,* 339 U. S. 216:

> "This court has evolved a procedure which assures an examinaton into the substance of a prisoner's protest against unconstitutional detention without allowing destructive abuse of the precious guarantee of the Great Writ. Congress has specifically approved it * * *.
>
> "It is this court's conviction that orderly Federal procedure under our dual system of government DEMANDS that the state's highest courts should ordinarily be subject to reversal ONLY BY THIS COURT.
>
> * * *
>
> "Oklahoma denied habeas corpus after obviously careful consideration. IF THAT DENIAL VIOLATED FEDERAL CONSTITUTIONAL RIGHTS, THE REMEDY WAS HERE, NOT IN THE DISTRICT COURT * * *." (Emphasis supplied.)

The district court naturally gave due weight to the prior adjudications. This duty is enjoined upon it by the Supreme Court. *Salinger v. Loisel, supra,* 265 U. S. 230-231:

> "At common law the doctrine of res adjudicata did not extend to a decision on habeas corpus refusing to discharge the prisoner. * * *
>
> "But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times, when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of number. But when a right to an appellate review was given, the reason for that practice ceased, and the practice came to be materially changed,—just as when a right to a comprehensive review in criminal cases was given, the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed * * *
>
> "Among the matters which may be considered, and even given controlling weight, are * * * a prior refusal to discharge on a like application.

Stonebreaker v. Smyth, supra, 163 F. (2d) 499:

> "The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief."

The United States Supreme Court and its individual justices have never been loath to intercede in behalf of state prisoners where the petition for *certiorari* disclosed a violation of constitutional rights. They too are cognizant of their judicial duty to guard individual rights.

CONCLUSION

The following is applicable to the trial judges below, *In Re Hein v. Smith, supra,* 35 Wn. (2d) 694:

> "The judge who heard the *habeas corpus* matter did not preside at the original trial. At this hearing, he allowed great latitude in the examination of witnesses. He considered the age of the boy. He appreciated the fact that it was his duty to protect this boy in all rights guaranteed to him under the constitution. He was patient and fair. From the record, he could not have decided otherwise."

A more proper conclusion could not be found than the words of the Honorable Ralph C. Bell when he sentenced Richard Hein to life imprisonment in the Washington State Penitentiary (R. 1029):

> "I heard very much, or considerable, during the presentation of this cause of recognition by our system of government and of laws, of the dignity, the security of man, and the individual. This has applied to you on trial. I could not help but wonder whether the dignity of man and the individual, as applied to poor old James Moore was being forgotten. For the first right of all of us is to enjoy life,—to have it, and to live. And as one who is guilty, you have taken the life of an old, peaceful, harmless, quite nearly blind man, and you must answer to the penalty of the law."

Respectfully submitted,

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